

Supreme Court to Rule on Whether Sovereign Immunity Protects States from Copyright Infringement Claims

Jun 24, 2019

Categories:
Publications

On June 3, the U.S. Supreme Court agreed to take on the question of whether states (and instruments of the state) are immune from copyright infringement liability under the doctrine of sovereign immunity.[1]

It is well established that under the Eleventh Amendment that neither states nor instrumentalities of the state may be sued in federal court unless the state or instrumentality waives its sovereign immunity or Congress enacts a law to override it. Congress attempted to do the latter when it passed the Copyright Remedy Clarification Act of 1990 (CRCA). However, nearly every court that has considered the issue since has concluded that the CRCA is unconstitutional.[2]

The courts have found Congress did not have the constitutional authority to enact the CRCA for two reasons. First, although it is possible to abrogate sovereign immunity through Section Five of the Fourteenth Amendment, which authorizes Congress to protect property rights (including intellectual property rights) from state deprivation, courts have consistently held that Congress did not properly do so when it enacted the CRCA. Second, courts have concluded that Congress cannot rely on the Copyright Clause in Article I of the Constitution to abrogate state immunity.

The question to be decided by the Supreme Court arises from the Fourth Circuit's decision in *Allen v. Cooper*[3], which also found the CRCA unconstitutional. The plaintiff in *Allen* is the exclusive photographer of the shipwreck of Queen Anne's Revenge and has been since 1998. The State of North Carolina allegedly used the plaintiff's photographs without his consent. The parties entered into a settlement agreement, but the State of North Carolina continued to use the photographs in violation of the settlement agreement.[4]

When the photographer sued the State of North Carolina for copyright infringement, the district court concluded, to nearly

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

everyone's surprise, that "Congress ha[d] clearly abrogated state immunity in cases arising under the CRCA, and that such an abrogation [was] congruent and proportional to a [now] clear pattern of abuse by the states." In so holding, the district court reviewed the legislative history of the CRCA, the policy and history underlying the sovereign immunity doctrine, and current evidence of copyright infringement by the states.

The Fourth Circuit promptly reversed, aligning itself with the Fifth and Eleventh Circuits that have also weighed in on the issue.[5] There is no circuit split on this issue, but the Supreme Court has decided to weigh in anyway, potentially resolving a standing dispute between states and instruments of states on one hand and copyright owners on the other.

---

[1] *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018), cert granted, 2019 WL 134012, *1 (U.S. June 3, 2019) (No. 18-877).

[2] See Chavez v. Arte Publico Press, 204 F.3d 601 (5th Cir. 2000); Jacobs v. Memphis Convention & Visitors Bureau, 710 F. Supp.2d 663, 672; Rainey v. Wayne State University, 26 F. Supp.2d 973 (E.D. Mich. 1998).

[3] *Allen v Cooper*, 895 F.3d 337 (4th Cir. 2018).

[4] To make matters more interesting, the State of North Carolina then passed a law that made all photos and video footage of shipwrecks in the custody of the state's public records available for use without limitation. Although the district court did not decide the issue, the court indicated that the statute was likely preempted by the Copyright Act and therefore invalid.

[5] See *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000); *National Ass'n of Bds. Of Pharmacy v. Board of Regents of the Univ. Sys. Of Georgia*, 633 F.3d 1297, 1315 (11th Cir. 2011).

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons